

APPROVED 7/23/03

TOWN OF WESTFORD

ZONING BOARD OF APPEALS

MINUTES

DATE: June 17, 2003

TIME: 8:20 P.M.

PLACE: Westford Academy Lecture Hall

PRESENT: Sam Frank, Ron Johnson, Dave Earl, Jay Enis, Roger Hall,
Bob Herrmann, Jim Kazeniac

OTHERS

PRESENT: Jennifer Burke-Permitting Office Manager; Ellen Doucette-
Town Counsel; Mark Bobrowski-MHP Technical Advisor;
Jim Silva-Board of Selectmen

DISCUSSION WITH MARK BOBROWSKI

Board to discuss general questions related to projectes filed under Chapter 40B

If all our questions are not answered to our satisfaction, does that provide grounds for denial?

BOBROWSKI: The regulations say that the Zoning Board is entitled to preliminary information. The statute anticipates that the Zoning Board will get preliminary information. The Board will get final details after the permit is issued so that the applicant does not have to spend the money up front thus wasting it if the Board denies the permit. There is always a dynamic by which the applicant wants to give the Board a "crayon" drawing and the Board cannot make a reasonable, rational decision without having more information than the regulations allow. Those are technical decisions for the engineers rather than the Board. If the engineer tells the Board that conceptually he cannot see how the stormwater system is going to work unless he gets more detailed grading plans, or more detailed drainage calculations, then the Board should back the engineer and ask more information. The same thing would apply to traffic. If the Board denied the project for lack of information, it would not have an impact at the State

level. An applicant should not ask for blanket waivers from the regulations, they should follow the regulations that they can follow.

What are typical mitigation items that the ZBA can reasonably request for a 40B developer?

BOBROWSKI: Anything, it does not have to be narrow and related to the project.

What if we feel we are not getting a complete or honest answer?

BOBROWSKI: It depends on where the Board is in the proceedings. If it is the second meeting and the developer refuses to pay the escrow account up or give a more advanced plan, deny and send it to Boston. When it gets to Boston tell them it was a totally uncooperative applicant who would not give the Board what was wanted or to the State's standards. If it is the ninth meeting, it will go to Boston and will not come back to the Town. There is a remand a board can get at an early stage that a board cannot get at a later stage.

In the case of public safety and public health matters, is it enough to say, for example, that an official prefers to see a particular design feature, or must the town state this as an absolute requirement, and if so, should it be in writing and with what amount of justification? If all this is done, is such a requirement likely to be upheld by the Housing Appeals Committee?

BOBROWSKI: The public health and safety standards have to be fixed to a public health or safety standard found in the state building code, fire code, zoning, subdivision regulations, Board of Health regulations, wetlands act, local wetlands bylaws, etc.

Is there a legally acceptable way to get at least 5 members into the final vote, if 3 or more members have missed any public hearings?

DOUCETTE: The law is that members must be at every single public hearing to vote. If they vote and the developer takes an appeal he can argue that the vote was invalid which sends the project back to the Town.

BOBROWSKI: If the developer acquiesces to the voting, he will not be able to claim it later. The abutters may use that vote for an appeal and seek a remand because some members did not attend all the meetings.

Generally, should motions be made by regular members rather than alternates?

BOBROWSKI: It is appropriate to have the voting members direct the procedural aspects of the meeting. There is nothing wrong with allowing the non-voting members to participate in the discussions or deliberations. If a non-voting member wanted to suggest a motion, the Board could take a recess and provide the motion to the voting members.

A key is how the neighbors can participate in the outcomes of the working session discussions. Concern is that the current process cuts off this interaction with the ZBA as a whole and with abutters.

BOBROWSKI: If the work sessions are announced and posted abutters can attend as observers. The downside of having the abutters attend the work sessions as observers is that it would inhibit an open and frank discussion between the applicant and the Board. The dynamic of the work session is to try to establish a rapport with the developers. The work sessions should include the civil engineer, traffic engineer and architect testifying on the remaining big issues. The initial information should be on the public record. New information should not be brought forth in the work session. The Board members should be informed as to what took place at the work session.

Can the ZBA ask for, or require, bonding (or escrow or a mitigation fund, etc.) to set aside funds for repairs to septic systems, stormwater systems, etc., that may occur after the homeowners' association has taken responsibility for such repairs and maintenance?

BOBROWSKI: Absolutely. It is not a subdivision so the Board cannot bond the building. The homeowners' association should get a manual on how to operate the septic system, that it is incorporated into the homeowners' association documents, if there is a management company the manual is provided, if they do not maintain it they convey any necessary easement to the Town to maintain it, the Town can ask them for reimbursement for any costs, and if they do not reimburse promptly the Town can put a lien on the units.

Can electronic records be made of the work sessions? Are there reasons not to do so?

BOBROWSKI: If it is a posted meeting it can be taped, if it is not posted it does not need to be taped.

Since the 40B statute and its derivative DHCD regulations are subject to change in the near future, is there a way to know what set of rules applies to a new 40B application?

BOBROWSKI: There is no way to know. There is a report from the Governor's Subcommittee Task Force posted on the DHCD's website.

Please provide legally defensible rationale for the work session part of the application review process. We have received comments challenging this process from an open meeting point of view. This rationale needs to be understood, and would be included in a written guide to the 40B process that the ZBA may provide for the public.

BOBROWSKI: If work sessions continue, there should be no charge from the Board to report, investigate or recommend. Staff can attend and make a report. There is no open meeting law that pertains to staff. The Board member(s) attending the work session can make a report of the facts discussed, but no recommendation can be given.

Is there any effective way (e.g., by modifying the local 40B rules and regulations, or by establishing a protocol with the Selectmen) by which the ZBA can review and comment on the design concept for a new 40B development, before detailed plans are drawn up by the applicant? The

ZBA can easily be put in the position of being too late to effect change, even if the same density requested by an applicant can be provided by a better design concept.

BOBROWSKI: This has been addressed in the regulation changes proposed by the Governor's Subcommittee Task Force. This concern can be addressed during the pre-application process with the Board of Selectmen before it reaches the Zoning Board of Appeals.

ADJOURNMENT

The Board voted unanimously to adjourn the meeting.

Submitted by Beth Kinney, Recording Secretary